Pace Medical Transport, LLC *and* Henry Davenport, Jr. Case 22–CA–235369

January 27, 2022

DECISION AND ORDER

BY MEMBERS RING, WILCOX, AND PROUTY

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge filed by Henry Davenport, Jr. against Pace Medical Transport, LLC, the Respondent,[1] the General Counsel issued a complaint on April 29, 2019. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by discharging Davenport because it believed Davenport was discussing his salary with other employees. After being granted a continuance, the Respondent filed a timely answer to the complaint on June 19, 2019, denying the allegations in full.

Subsequently, the Respondent executed an informal settlement agreement ("the Agreement"), which was approved by the Regional Director for Region 22 on October 8, 2019.[2] The Agreement contains a provision entitled, "Performance," addressing the possibility of Respondent's non-compliance with the terms of the Agreement:

> Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.
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> The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a Complaint that includes the allegations covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices.

By letter dated October 9, 2019, the Compliance Officer for Region 22 sent the Respondent's counsel a copy of the approved Agreement and a cover letter summarizing the terms of the Agreement.

By email dated October 30, 2019, the Respondent requested a 2-week extension to comply with the settlement agreement. By email dated October 31, 2019, the Regional Director denied the Respondent's request for an extension and notified the Respondent's counsel that the Respondent must comply with the terms of the Agreement and provide evidence of its compliance within 14 days, or the Regional Director would institute default proceedings against the Respondent. The Respondent did not comply.

Accordingly, pursuant to the terms of the noncompliance provisions of the Agreement, the Regional Director reissued the complaint on January 19, 2020. The substantive allegations of the reissued complaint were identical to the original complaint. The Respondent did not file an answer to the reissued complaint. On August 12, 2021, the General Counsel filed a Motion to Transfer the Case to the Board and for Default Judgment. On August 13, 2021, the Board issued an Order Transferring the Proceeding to the Board and Notice to Show Cause why the motion should not be granted.[3] That document was served on the Respondent at its address in Roseland, New Jersey, and was returned as undeliverable. Thereafter, the Board learned of a possible additional address for the Respondent. Given this additional address for the Respondent at which service had not been attempted previously, the Board issued a Supplemental Order and Notice to Show Cause on October 22, 2021, which designated November 5, 2021, as the response date. On October 23, 2021, the Respondent sent an email to the Board, informing the Board that it was no longer in business as of February 2020. The Respondent did not otherwise respond to the Supplemental Order and Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days

[1] Charge 22–CA–235369 was filed on February 5, 2019.

[2] The Agreement required the Respondent to offer Davenport immediate reinstatement and to make him whole for lost wages and benefits resulting from the Respondent's unlawful action, among other remedies. The Regional Director's order approving the settlement agreement also ordered that the complaint and notice of hearing dismissed.

[3] The General Counsel's motion specifically requested that the Board deem all matters alleged in the complaint to be admitted as true and issue a Decision and Order that provides "an appropriate remedy for the violations alleged in the Complaint."

from service of the complaint, unless good cause is shown. The complaint affirmatively stated that unless an answer was received by March 4, 2020,[4] the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. In the instant motion, the General Counsel asserts that the Board should find the allegations of its January 19, 2020 complaint to be admitted and issue a Decision and Order.

The record shows that the Respondent did not file an answer to the January 19, 2020 complaint. However, the Respondent did file an answer to the April 29, 2019 complaint. That answer denied allegations that are substantially the same as the unfair labor practice allegations contained in the reissued January 19, 2020 complaint.

The Board has denied default judgment when the record reveals that the Regional Director issued a complaint, the respondent filed an answer, the parties executed a non-Board settlement agreement, the Regional Director thereafter withdrew approval of the settlement agreement and reissued the complaint alleging substantially similar allegations, and the respondent failed to file an answer to the reissued complaint. See, e.g., *Berkebile Bros.,* 360 NLRB 81 (2013)(finding that an answer to an original complaint survived a breached non-Board settlement agreement and a subsequently unanswered reissued complaint) and *West Fork Energy, Inc*., 305 NLRB 870 (1991)(same).

The Board has granted summary judgment, however, where the settlement agreement explicitly provides for withdrawal of the answer in the settlement language. See *Orange Data, Inc*. 274 NLRB 1018, 1018–1019 & fn. 4 (1985)(granting summary judgment, but noting denial appropriate where no explicit withdrawal language exists).[5] Here, although the Board was a party to the settlement, the settlement terms do not contain the explicit language providing for the withdrawal of the answer to the complaint upon the approval of the settlement.

The Board has also granted default judgment and found that a presettlement answer is withdrawn where the settlement agreement explicitly states that in the event of noncompliance with the terms of the settlement agreement the Regional Director may file a complaint, the General Counsel may file a motion for default judgment, and the charged party agrees that all the allegations of the complaint will be deemed admitted, the right to file an answer to such complaint will be waived, and the Board may without necessity of trial or any other proceeding, find all allegations of the complaint to be true. See, e.g., *Semper Fi Plumbing & Heating, Inc*., 367 NLRB No. 98, slip op. at 2 fn. 5 (2019) (finding that through the explicit language of the agreement, the parties objectively manifested assent to the entry of a default-judgment order in the event of noncompliance and to the withdrawal of any previously filed answer). Here, the Agreement does not contain any such language. The Agreement explicitly provides only for reissuance of the complaint in event of noncompliance.

Accordingly, we find that absent explicit language providing for withdrawal of the presettlement answer or other language indicating that in the event of noncompliance, the parties objectively manifested assent to the entry of a default-judgment order and to the withdrawal of any previously filed answer, the Respondent's answer to the original complaint survives the breached settlement agreement and the subsequently reissued complaint. Therefore, we shall deny the General Counsel's Motion for Default Judgment.

ORDER

It is ordered that the General Counsel's Motion for Default Judgment is denied and the proceeding is remanded to the Regional Director for Region 22 for further appropriate action.

Dated, Washington, D.C. January 27, 2022

John F. Ring, Member

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] The complaint was not received by Respondent's new counsel until February 19, 2020.

[5] The more recent settlement breach cases have been styled as default judgment motions, but the rationale of *Orange Data* still applies.

In *Orange Data* the Board took administrative notice of the fact that in 1981 the Board changed the language in the standard informal settlement agreement Form NLRB-4775 to include language stating that "Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s). . . *as well as any answer filed in response*." *See Orange Data,* supra, at 1018. The Board held that where such language is included in a settlement agreement, the answer to the presettlement complaint is withdrawn by the explicit terms of the agreement and does not remain extant following breach of the settlement and reissuance of the complaint, and therefore, does not preclude the Board from granting a motion for summary judgment. Id. at 1019. The Board, however, also explicitly upheld prior Board precedent finding that, where explicit language is not included in the settlement agreement, the respondent's answer to the initial complaint precludes granting summary judgment. Id. at 1019 fn. 4.